

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION)) MDL NO. 1456) Civil Action No. 01-12257-PBS) Subcategory No. 03-10643
THIS DOCUMENT RELATES TO:)
<i>The City of New York, et al.</i>)
v.)
<i>Abbott Laboratories, Inc., et al.</i>)

**AUGUST 2009 STATUS REPORT ON BEHALF OF
THE CITY OF NEW YORK AND NEW YORK COUNTIES**

The undersigned counsel for the City of New York and New York Counties in the above-captioned action (hereinafter “plaintiffs”) hereby submit the attached Status Report for August 2009, in accordance with the Court’s June 17, 2004 Procedural Order.

Dated: August 3, 2009

Respectfully submitted,

**City of New York and New York Counties in
MDL 1456 except Nassau and Orange, by**

KIRBY McINERNEY, LLP
825 Third Avenue
New York, New York 10022
(212) 371-6600

By: /s/ Joanne M. Cicala
Joanne M. Cicala
Kathryn B. Allen

Ross B. Brooks, Esq.
MILBERG LLP
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300
Special Counsel for the County of Nassau

Theresa A. Vitello, Esq.
LEVY PHILLIPS &
KONIGSBERG, LLP
800 Third Avenue
New York, NY 10022
(212) 605-6205
Counsel for the County of Orange

**August 2009 Status Report on Behalf of the
City of New York and New York Counties**

FUL Summary Judgment Briefing

1. July 8, 2009 Hearing

On July 8, 2009, the Court heard oral arguments on the parties' respective motions for partial summary judgment on FUL issues. At the hearing, the Court requested several supplements to the record.

First, the Court requested a filing from the Department of Justice ("DOJ") to supplement the Brief of the United States on the Federal Upper Limit, filed June 28, 2007. [Docket No. 4413]. The DOJ has advised plaintiffs that it intends to provide a supplemental brief in late August or early/mid-September 2009.

Second, the Court asked plaintiffs to supplement the CMS testimony describing how CMS set the FUL including those occasions when CMS did not set the FUL on the lowest published price. On July 10, 2009, plaintiffs provided supplemental CMS deposition testimony excerpts to the Court. *See* July 10, 2009 letter from Joanne M. Cicala, Esq. to the Honorable Patti B. Saris, with exhibits.

Third, the Court requested pricing arrays from defendants for the 31 instances in which CMS set a FUL for the nine GCNs at-issue in the summary judgment motions referred to above. On July 30, 2009, defendants provided such arrays. *See* July 30, 2009 letter from John T. Montgomery, Esq. to the Honorable Patti B. Saris [Docket No. 6250, Sub-docket No. 135].

In addition, plaintiffs will file a supplement regarding the calculation of FUL damages on or before September 18, 2009.

2. Plaintiffs' Partial Summary Judgment Motion against Roxane

On July 3, 2009, plaintiffs filed their Reply Local Rule 56.1 Statement of Undisputed Material Facts as to Boehringer Ingelheim Roxane, Inc. [Docket No. 6251, Sub-docket No. 136].

3. Defendants' Motion to Exclude Plaintiffs' Expert Testimony

On July 23, 2009, the Court granted Defendants' Motion for Leave to File Reply Memorandum in Support of Joint Motion to Exclude the Proffered Expert Report and Testimony of Harris Devor, C.P.A. [Docket N. 6253, Sub-docket No. 137]. On that same day, defendants' filed their reply memorandum in support of their joint motion to exclude the Expert Report and Testimony of Harris Devor, C.P.A. [Docket No. 6281; Sub-docket No. 150]. The motion remains *sub-judice*.

GSK Motion for Partial Summary Judgment

On July 2, 2009, GSK filed its sur-reply in support of its Motion for Partial Summary Judgment. [Docket No. 6250; Sub-docket No. 135]. The motion remains *sub-judice*.

Discovery

1. Motion to Quash the Cross-Notice of the Deposition of Lynn Donovan

On July 14, 2009, plaintiffs filed their Corrected Emergency Motion to Quash Defendant Schering-Plough Corporation's, Schering Corporation's and Warrick Pharmaceutical Corporation's (hereinafter collectively referred to as "Schering") Cross-Notice of Continued Deposition of Lynn Donovan. [Docket No. 6262, Sub-docket No. 138]. Plaintiffs oppose the cross-notice due to lack of relevance and lack of sufficient notice. Ms. Donovan works for Hawaii Medicaid, and she has never worked for New York Medicaid. Furthermore, defendants

did not serve their cross-notice of the deposition until 11 days prior to the deposition.

On July 16, 2009, defendant Schering filed its Opposition to Plaintiffs' Motion to Quash the continued deposition of Lynn Donovan. [Docket No. 6332, Sub-docket No. 153].

On July 20, 2009, defendants took the deposition of Lynn Donovan, Hawaii Medicaid. Plaintiffs objected to the deposition and noted on the record that their motion was *sub judice*.

2. Schering's Motion for a Protective Order

Plaintiffs will file their motion to lift the Schering Protective Order and expert affidavit after the Court rules on GSK's Motion for Partial Summary Judgment [Docket No. 5706].

Proposed Schering/Ven-a-Care Settlement

On July 23, 2009, plaintiffs filed their Motion to Intervene for the Limited Purpose of Objecting to the Ven-a-Care/Schering/Warrick Proposed Settlement. [Docket No. 6288, Sub-docket No. 151; Docket No. 6289, Sub-docket No. 152]. During the July 24, 2009, scheduling conference the Court entered a scheduling order which provides, inter alia, for a briefing schedule and that plaintiffs will be heard in connection with the proposed settlement (whether as amici or intervenor). On September 25, 2009, the Court will hear oral arguments regarding the above filings.

CERTIFICATE OF SERVICE

I, Kathryn Allen, hereby certify that on the 3rd day of August, 2009, I caused a true and correct copy of the above August 2009 Status Report for the City of New York and New York Counties to be delivered to counsel of record for defendants by electronic service pursuant to Case Management Order No. 2 entered by the Honorable Patti B. Saris in MDL No. 1456.

Dated: August 3, 2009

/s/ Kathryn B. Allen
Kathryn B. Allen
Kirby McInerney LLP
825 Third Avenue
New York, NY 10022
(212) 371-6600